

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DONTE McCLELLON, an individual

Plaintiff,

v.

WELLS FARGO ADVISORS FINANCIAL
NETWORK, LLC (CRD#: 11025), a
corporation; and WELLS FARGO
CLEARING SERVICES, LLC (CRD#: 19616), a corporation,

Defendants.

CASE NO. C18-0852-JCC

ORDER

This matter comes before the Court on Plaintiff's motion to vacate order pursuant to Federal Rule of Civil Procedure 60(b), to reopen the case, and for recusal (Dkt. No. 49).¹ Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby DENIES the motion for the reasons explained herein.

I. BACKGROUND

On October 12, 2018, the Court granted Defendants' motion to dismiss, dismissed Plaintiff's claims with prejudice, and entered judgment dismissing Plaintiff's complaint. (Dkt. Nos. 30, 31.) On January 22, 2019, Plaintiff moved to vacate the judgment and for leave to

¹ Plaintiff does not offer substantive argument in support of his request that his case be reopened. (*See generally* Dkt. No. 49.)

1 amend his complaint, which the Court denied. (Dkt. Nos. 32, 37.)

2 Plaintiff appealed the Court's orders on Defendants' motion to dismiss, Plaintiff's motion
3 to vacate, and Plaintiff's motion for reconsideration, along with the Court's judgment dismissing
4 Plaintiff's complaint. (Dkt. No. 42.) Plaintiff moved for leave to appeal *in forma pauperis*
5 ("IFP"). (Dkt. No. 41.) The report and recommendation ("R&R") of the Honorable Brian A.
6 Tsuchida recommended that Plaintiff's request be denied, finding that Plaintiff's appeal was not
7 taken in good faith. (*See* Dkt. No. 45.) Objections to the R&R were due by April 26, 2019. (*Id.*)
8 Plaintiff's objections were filed with the Court on April 29, 2019 although they were postmarked
9 on April 26. (Dkt. No. 47.) On April 30, 2019, the Court adopted the R&R and denied Plaintiff's
10 request to appeal IFP. (Dkt. No. 46.) Plaintiff now moves to vacate the Court's order adopting
11 the R&R, to reopen his case, and for recusal. (Dkt. No. 49.)

12 **II. DISCUSSION**

13 **A. Motion to Vacate**

14 Plaintiff contends that he inadvertently filed his objections to the R&R after the deadline
15 had passed, as he was not in Washington between April 12 and April 30, relied on a family
16 member to send his objections to the R&R, and in his experience court filings are treated as
17 timely when postmarked by the filing deadline under the United States tax code. (*See id.* at 1.) A
18 court may relieve a party from an order for "mistake, inadvertence, surprise, or excusable
19 neglect." Fed. R. Civ. P. 60(b)(1). The Court finds that Plaintiff's alleged inadvertence in failing
20 to timely file his objections to the R&R does not merit vacation of the Court's order adopting the
21 R&R pursuant to Federal Rule of Civil Procedure 60(b)(1).

22 Plaintiff also argues that vacation of the Court's order is merited under Federal Rule of
23 Civil Procedure 60(b)(3). (Dkt. No. 49 at 2–4.) A court may relieve a party from an order for
24 "fraud . . . , misrepresentation, or misconduct by an opposing party." Fed. R. Civ. P. 60(b)(3).
25 Plaintiff alleges that he "believes that the Honorable Brian A. Tsuchida, Chief Magistrate Judge,
26 is doing something improper" and that "it is the belief of the Pro Se Plaintiff that the Honorable

1 Brian A. Tsuchida, Chief U.S. Magistrate Judge in connection with Defendant Capital One
2 Bank's^[2] counsels' non-motion response and declaration . . . is misrepresenting Pro Se
3 Plaintiff's IFP filing(s) and Complaint(s) in an erroneous and exaggerated matter [sic] and is not
4 presenting it in a proper context as both were filed." (Dkt. No. 49 at 2–3) (emphasis in original).
5 Plaintiff's speculative allegations of fraud or misrepresentation by Judge Tsuchida and
6 Defendant are insufficient to merit relief under Federal Rule of Civil Procedure 60(b)(3).

7 The remainder of Plaintiff's arguments challenge Judge Tsuchida's evaluation of his IFP
8 application. (See Dkt. No. 49 at 2–4.) The Court construes these arguments as a motion for
9 reconsideration. Motions for reconsideration are generally disfavored. W.D. Wash. Local Civ. R.
10 7(h)(1). Reconsideration is only appropriate where there is "manifest error in the prior ruling or a
11 showing of new facts or legal authority which could not have been brought to [the Court's]
12 attention earlier with reasonable diligence." *Id.* "A motion for reconsideration should not be used
13 to ask the court to rethink what the court had already thought through—rightly or wrongly."
14 *Premier Harvest LLC v. AXIS Surplus Insurance Co.*, No. C17-0784-JCC, Dkt. No. 61 at 1
15 (W.D. Wash. 2017) (quoting *U.S. v. Rezzonico*, 32 F. Supp. 2d 1112, 1116 (D. Ariz. 1998)).
16 Plaintiff argues that Judge Tsuchida erred in evaluating Plaintiff's present financial status and his
17 responses on the IFP application. (See Dkt. No. 49 at 2–3.) But Plaintiff has not identified a
18 manifest error in the R&R, or presented new facts or legal authority meriting reconsideration.
19 Moreover, Judge Tsuchida's primary conclusion was that Plaintiff's appeal was not taken in
20 good faith—not that Plaintiff failed to allege indigency. (See Dkt. No. 45.)

21 In sum, Plaintiff has not established a ground meriting vacation or reconsideration of the
22 Court's order adopting the R&R and denying his request to proceed IFP on appeal, and his
23 motion is DENIED on this ground.

24 ² Capital One Bank is not a named defendant in this case, but is referred to throughout
25 Plaintiff's motion. (See generally Dkt. No. 49.) Plaintiff filed a substantively identical motion in
26 another case he has pending before the Court in which Capital One Bank is a party. See
McClellon v. Capital One Bank, N.A., Case No. C18-0909-JCC, Dkt. No. 41 (W.D. Wash. 2018).

1 **B. Motion for Recusal**

2 Plaintiff asks the Court to recuse itself from the case pursuant to 28 U.S.C. § 455(a).
3 (Dkt. No. 49 at 4–5.) “Any justice, judge, or magistrate judge of the United States shall
4 disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”
5 28 U.S.C. § 455(a). “[A] judge’s prior adverse ruling is not sufficient cause for recusal.” *Taylor*
6 *v. Regents of Univ. of California*, 993 F.2d 710, 712 (9th Cir. 1993) (quoting *United States v.*
7 *Studley*, 783 F.2d 934, 939 (9th Cir. 1986)). Plaintiff asserts that recusal is warranted because the
8 Court has made several adverse rulings against him. However, that is not a valid basis for
9 recusal. *See Taylor*, 993 F.2d at 712. Therefore, Plaintiff’s motion is DENIED on this ground.
10 The Clerk is DIRECTED to refer Plaintiff’s motion for recusal to Chief United States District
11 Judge Ricardo S. Martinez for further consideration. *See* W.D. Wash. Local Civ. R. 3(g).

12 **III. CONCLUSION**

13 For the foregoing reasons, Plaintiff’s motion to vacate order pursuant to Federal Rule of
14 Civil Procedure 60(b), to reopen the case, and for recusal (Dkt. No. 49) is DENIED.

15 DATED this 6th day of June 2019.

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19 John C. Coughenour
20 UNITED STATES DISTRICT JUDGE
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